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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 110321210-2495-01]

RIN 0648-BA93

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands
Management Area; Groundfish Retention Standard

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric
Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes a regulatory amendment that would modify the groundfish retention standard (GRS) program in the Bering Sea and Aleutian Islands (BSAI) management area by removing certain regulatory requirements mandating minimum levels of groundfish retention and adding requirements for annual reports on groundfish retention performance. The GRS program was implemented to increase the retention and utilization of groundfish caught by trawl catcher/processor (C/P) vessels not listed in the American Fisheries Act (AFA), referred to as Amendment 80 vessels, and Amendment 80 cooperatives participating in the Bering Sea and Aleutian Islands groundfish fisheries. NMFS has discovered that the regulatory methodology used to calculate compliance with the GRS requires individual Amendment 80 vessels and Amendment 80 cooperatives to retain groundfish at minimum rates well above the minimum rates recommended by the Council or implemented by NMFS. As a result, the GRS is expected

to impose significantly higher than predicted compliance costs on vessel owners and operators due to the increased level of retention needed to meet the minimum retention rates.

Additionally, NMFS has discovered that enforcement of the GRS has proven far more complex, challenging, and potentially costly than anticipated by NMFS. This proposed rule would relieve non-AFA trawl C/Ps and Amendment 80 cooperatives from undue compliance costs stemming from the mandatory GRS rates, but continue the GRS program goals of increased retention and utilization by establishing additional reporting requirements on groundfish retention performance together with current monitoring requirements for the Amendment 80 fleet. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the fishery management plan, and other applicable law.

DATES: Comments must be received no later than [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2011-0049, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal www.regulations.gov. To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA-NMFS-2011-0049 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on that line.
- Mail: Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.

- Fax: Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907-586-7557.
- Hand delivery to the Federal Building: Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible.

Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the Environmental Assessment, Regulatory Impact Review (RIR), and Initial Regulatory Flexibility Analysis (IRFA) that are collectively known as the analysis prepared for this proposed rule may be obtained from <http://www.regulations.gov> or from the Alaska Region website at <http://alaskafisheries.noaa.gov>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS at the

above address and by e-mail to OIRA_Submission@omb.eop.gov or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Seanbob Kelly, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the U.S. groundfish fisheries of the Bering Sea and Aleutian Islands management area (BSAI) in the Exclusive Economic Zone (EEZ) under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The Council prepared the FMP pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Regulations implementing the FMP appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

Background

In June 2003, the Council adopted Amendment 79 to the FMP. Amendment 79 revised section 2.2.1 of the FMP to include the management objective of improving the retention of groundfish where practicable, by establishing minimum groundfish retention standards. At the same time the Council adopted Amendment 79, it adopted the groundfish retention standard (GRS) program. NMFS published a final rule implementing the GRS program in April 2006 (71 FR 17362), and the GRS program became effective in 2008.

As originally recommended by the Council and approved by NMFS, the GRS program applied to non-AFA trawl C/Ps equal to or greater than 125 feet (38.1 m) length overall (LOA). The GRS program required each of these vessels to retain and utilize a minimum amount of groundfish caught during the calendar year. The Council recommended the GRS program for non-AFA trawl C/Ps because, as a group, they had the lowest retained catch rates of any C/P sector operating in the BSAI groundfish fishery. The Council chose to exclude non-AFA trawl C/Ps less than 125 feet (38.1 m) LOA from the original GRS program because GRS compliance

costs associated with observers and scale monitoring requirements were found to be higher for these vessels, and their contribution to the overall bycatch and discard of groundfish was minimal compared to vessels equal to or greater than 125 feet (38.1 m) LOA.

The Council's policy objectives for the GRS program included reducing bycatch, minimizing waste, and improving utilization of fish resources to the extent practicable, acknowledging that any solution to the problem of reducing discards must take into account the ability of NMFS to monitor discards and adequately enforce any regulations. The full rationale for the GRS is described in the preamble to the final rule for the GRS program (71 FR 17362, April 6, 2006) and is not repeated here. Regulations implementing the GRS program at §§ 679.7(m) and 679.27(j) established annual minimum groundfish retention standards and prohibited the owner or operator of a non-AFA trawl C/P equal to or greater than 125 feet (38.1 m) LOA from retaining an amount of groundfish during a fishing year that is less than the GRS. Section 679.27(j)(2) contains the equations used by NMFS for determining GRS compliance. GRS program regulations also established new observer and scale requirements at § 679.27(j)(5) in order to effectively monitor and account for groundfish catch onboard non-AFA trawl C/Ps subject to the GRS program. The GRS was phased in to allow owners and operators of affected vessels time to adjust to the retention requirements. The GRS was based on historic total catch and retention estimates presented in the analysis for the GRS program. The GRS schedule can be found at § 679.27(j)(4) and is listed below in Table 1.

Table 1. Annual Groundfish Retention Standard at 50 CFR 679.27(j)(4).

| GRS Schedule | Annual GRS |
|--------------------------|-------------------|
| 2008 | 65% |
| 2009 | 75% |
| 2010 | 80% |
| 2011 and each year after | 85% |

In June 2006, the Council adopted Amendment 80 to the FMP, which authorized the allocation of specified groundfish species to harvesting cooperatives and established a catch share program for non-AFA trawl C/Ps. This catch share program is commonly referred to as the Amendment 80 program, and the vessels used in this program are commonly referred to as Amendment 80 vessels, or the Amendment 80 sector. Amendment 80 was intended to meet a number of policy objectives that included improving retention and utilization of fishery resources by the Amendment 80 sector, reducing potential bycatch reduction costs, encouraging fishing practices with lower discard rates, and promoting opportunities for the sector to increase the value of harvested species. NMFS approved Amendment 80 and published a final rule implementing it in 2007 (72 FR 52668, September 14, 2007), and the Amendment 80 program was fully effective starting with the 2008 fishing year.

Under the Amendment 80 program, NMFS annually issues an Amendment 80 quota share (QS) permit to a person holding the catch history of an original qualifying vessel. The amount of QS issued is based on the qualifying vessels' catch history of six Amendment 80 species (Atka mackerel, Aleutian Islands Pacific ocean perch, flathead sole, Pacific cod, rock sole, and yellowfin sole) in the BSAI from 1998 through 2004. Generally, the Amendment 80 program is intended to facilitate the formation of cooperatives among persons receiving Amendment 80 QS permits. These cooperatives are eligible to receive cooperative quota (CQ), which represents an exclusive harvest privilege for a portion of these fishery resources. Amendment 80 sector participants who do not choose to join a harvesting cooperative must fish in a limited access fishery, without an exclusive harvest privilege, and must continue in a race for fish with other participants in that fishery. The allocation of CQ allows vessel operators to make operational choices to improve returns from the fisheries and reduce discards of fish, because the

incentives of the limited access fishery - to maximize catch rates to capture a larger share of the available catch – are removed. The principal benefits from the Amendment 80 program are achieved with harvesters choosing to join cooperatives. These benefits are described more fully in the final rule for Amendment 80 (72 FR 52668, September 14, 2007).

In addition to issuing QS permits and providing mechanisms for the formation of cooperatives, the Amendment 80 program established measures to reduce the discard of groundfish. Amendment 80 modified the GRS program in two critical ways. First, the GRS program was extended to all non-AFA trawl C/Ps operating in the BSAI, removing the exemption for vessels under 125 feet (38.1 m) LOA. Therefore, all Amendment 80 vessels, regardless of size, are required to comply with the GRS. Second, Amendment 80 modified the method of calculating the total retention of groundfish catch that applies to cooperatives. Amendment 80 authorized a cooperative to meet the GRS by aggregating the retention rate of all vessels assigned to the cooperative. Under this modification, not every vessel within the cooperative is required to meet the minimum GRS; some vessels may not meet the minimum GRS as long as the minimum is met by the aggregated retention rate of all vessels in the cooperative. This action was intended to enable the owners of Amendment 80 vessels with relatively low retention rates to join a cooperative, assign their harvest privilege to the cooperative, and allow vessels with higher retention rates to harvest the cooperative's exclusive allocation of fish. Additionally, for Amendment 80 vessels that fish under a cooperative's exclusive harvest privilege, the costs associated with retaining less valuable fish under the GRS program may be offset by increased profitability because they are no longer operating in a race for fish.

Under the current GRS program, each Amendment 80 cooperative and each vessel

participating in the limited access fishery must ensure that it meets the GRS requirements, based on the amount of catch retained by that cooperative or vessel. Catch is defined in regulations at § 600.10 to include, but is not limited to, any activity that results in killing fish or bringing any live fish onboard a vessel. As noted earlier, vessels participating in a cooperative can aggregate the total catch and total retained catch by all vessels in the cooperative. Therefore, vessels with poorer retention rates may have an incentive to join a cooperative with other vessels that have a better retention rates and are able to offset the lower retention rates of those vessels. As the GRS increased, individual vessels with lower retention rates likely had greater difficulty meeting the GRS than vessels that coordinated with other vessels in an Amendment 80 cooperative.

Many of the objectives for establishing monitoring and enforcement regulations under Amendment 80 were similar to those under Amendment 79. However, the regulations implementing Amendment 80 established a quota management program that had somewhat different monitoring needs. Therefore, the Council recommended and NMFS implemented a separate, enhanced set of monitoring and enforcement regulations for Amendment 80 because of the increased incentive for Amendment 80 vessels and Amendment 80 cooperatives to engage in presorting or “high grading” of catch prior to weighing under the quota-based catch share management plan. The monitoring and enforcement regulations implemented for Amendment 80 were in addition to and did not remove any of the monitoring and enforcement regulations established under the GRS program and were intended to minimize the under-reporting or misreporting of catch under the quota-based catch share program.

Concerns with the GRS

At its April 2010 meeting, the Council requested that NMFS report on the status of monitoring, enforcing, and prosecuting the GRS program. The Council’s request was based, in

part, on the concerns raised by NMFS at the time the Council took final action on BSAI Amendment 93, which established Amendment 80 cooperatives. The request also was based upon general concerns expressed by participants in the Amendment 80 sector regarding the enforcement of the GRS. Specifically, the Council requested a report on the enforcement and prosecution concerns raised since the development of the GRS program, including changes to the GRS program under Amendment 80, changes proposed by the Council at the time it adopted Amendment 93 to the FMP, and concerns about monitoring and enforcing the GRS program that were identified by the agency or industry participants. The Council also requested conceptual alternatives to modify the GRS program to address these concerns.

In June 2010, NMFS provided the Council with a preliminary assessment of the GRS program. NMFS raised two key concerns in the June 2010 report to the Council. First, NMFS pointed out that the methodology for calculating annual retention standards established in regulations implementing the GRS was different than the methodology used in the analysis for the GRS program to estimate the fleet's historic retention rates. NMFS explained that the methodology implemented in regulation was necessary for calculating retention rates that were verifiable and enforceable on an individual vessel basis. However, when NMFS compared the retention rates produced by the two methodologies, NMFS determined that the methodology used in the analysis for the GRS program, which was the basis for the Council's selection of minimum retention rates, produced consistently higher retention rates than the methodology established in regulation. As a result, NMFS realized that the fleet had to retain more groundfish in order to meet the minimum retention rate using the regulatory methodology than the fleet would have been required to retain using the methodology in the analysis. Second, NMFS explained the difficulties the agency was encountering in effectively enforcing and prosecuting

the GRS for individual vessels, and that these difficulties would extend to prosecution of a single cooperative, or multiple cooperatives. NMFS also noted that since the GRS program was implemented, the retention rate of groundfish by the Amendment 80 fleet had increased substantially under either methodology. Additional information on the key concerns raised by NMFS is provided below.

At the June 2010 Council meeting, representatives of the Amendment 80 sector testified that vessel operators that met the GRS in 2009 will face significant additional challenges meeting the increasing standard. Vessel operators cited the differences in the Council's recommended GRS and NMFS' methodology for calculating compliance with that standard as an unintended burden on the fleet. Industry representatives reported to the Council that the GRS calculation specified in regulations results in a lower retention percentage than the methodology used in the analysis developed for the GRS program. Amendment 80 vessel operators raised concerns that it may not be possible to achieve the highest GRS required in regulation for vessels operating individually in the Amendment 80 limited access fishery, or collectively in a cooperative.

Differences in Catch Data Estimation

In its report to the Council, NMFS confirmed that the regulatory method for calculating compliance with the GRS consistently results in a lower calculated retention rate than the method used in the GRS program analysis, as shown in Table 2 below. In 2008, this difference was 13 percent, in 2009 it was 10 percent, and in 2010 it was 7 percent.

Table 2. Comparison of Methods to Calculate the Annual BSAI Groundfish Retention Rate for the Amendment 80 Sector

| Year | Regulatory GRS % | Total Catch ¹ (A) mt | Retained Catch ² (B) mt | Round Weight Equivalent ³ (D) mt | Historic Retention GRS Program Analysis (B)/(A) % | Regulatory Compliance Calculation (D)/(A) % | Difference % |
|------|------------------------|---------------------------------------|--|---|---|---|-----------------|
| 2003 | * | 269,050 | 188,584 | 183,334 | 70 | 68 | 2 |
| 2004 | * | 314,018 | 214,959 | 201,232 | 68 | 64 | 4 |
| 2005 | * | 301,538 | 236,226 | 216,391 | 78 | 72 | 7 |
| 2006 | * | 296,058 | 233,848 | 214,825 | 79 | 73 | 6 |
| 2007 | * | 322,492 | 250,398 | 223,581 | 78 | 69 | 8 |
| 2008 | 65 | 359,756 | 323,008 | 275,450 | 90 | 77 | 13 |
| 2009 | 70 | 334,304 | 301,508 | 268,953 | 90 | 80 | 10 |
| 2010 | 75 | 360,864 | 327,883 | 303,555 | 91 | 84 | 7 |

* GRS program not implemented until 2008

Source: Catch Accounting, April 29, 2011

¹Prior to 2008, total catch estimates were based on a combination of observer data and weekly production reports. After 2008, total catch estimates are based on scale weights of total groundfish catch from observer data.

²Prior to 2008, retained catch estimates were based on a combination of observer estimates of discards and data from weekly production reports. After 2008, retained catch estimates are based on observer estimates of discard.

³Retained catch for the purposes of the GRS program is based on the round weight equivalent of reported production.

The regulatory method requires a level of groundfish retention much higher than that intended by the Council when it adopted the GRS program. The reasons for the underestimates of groundfish retention are not clear, but likely reflect a mixture of factors. One possible source of the variation in the retention estimates may stem from differences in the data used in the analysis for the GRS program to calculate the historic total catch and NMFS' current method for estimating groundfish retention.

Total catch estimates in the groundfish fisheries off Alaska are generated by NMFS from information provided through a variety of required industry reports of harvest and at-sea discard, and data collected through an extensive fishery observer program. Over the past decade, NMFS changed the methodologies used to determine catch estimates from the NMFS blend database (1995 through 2002) to the catch accounting system (2003 through present). The analysis for the GRS program used data from the blend database to determine the total retention rates of the non-

AFA trawl C/P fleet and the Council relied on these retention rates to recommend specific groundfish retention standards for the GRS program.

In 2003, the catch accounting system was implemented to better meet the increasing information needs of fisheries scientists and managers. Currently, the catch accounting system relies on data derived from a mixture of production and observer reports as the basis of the total catch estimates. The approach for estimating retained catch used in the GRS program relies on round weight equivalents of retained products and NMFS product recovery rates to estimate retention. The 2003 modifications in catch estimation included providing more frequent data summaries at finer spatial and fleet resolution, and the increased use of observer data.

Redesigned observer program data collections were implemented in 2008, and include recording sample-specific information in lieu of pooled information, increased use of systematic sampling over simple random and opportunistic sampling, and decreased reliance on observer computations. As a result of these modifications, NMFS is unable to recreate blend database estimates for total catch and retained catch after 2002. Therefore, NMFS is not able to reliably determine differences in retention rates when comparing historic data from the blend database to the current catch accounting system.

Enforcement Concerns

In the June 2010 report, NMFS described a suite of enforcement concerns about the ability to effectively prosecute a violation of the GRS. When the GRS program was approved by NMFS, NOAA's Office of General Counsel for Enforcement and Litigation raised concerns about certain difficulties it anticipated in prosecuting vessel specific violations of the GRS program. These concerns primarily focused on the program's reliance on an annual groundfish retention percentage based in part on data collected by numerous observers deployed on a vessel

over the course of a year, and whether these observers would be available in future years to support the prosecution process. NMFS explained that these concerns are aggravated under Amendment 80 because the number of observers necessary to support an enforcement case and associated prosecution increases significantly from a single vessel scenario to a multiple vessel cooperative, or a multiple cooperative scenario as proposed by the Council at the time it adopted Amendment 93.

NMFS also explained that enforcement of the GRS has proven far more complex, challenging, and potentially more costly than anticipated at the time it approved the GRS program. The Amendment 80 sector has operated under a cooperative system for several years in a manner that appears to facilitate compliance with the GRS (see Table 2 of this preamble); however, the method used to calculate compliance with the GRS requires higher retention rates than those used by the Council to establish the GRS. Thus, many participants in the Amendment 80 sector have expressed strong doubt that it will be possible to achieve the highest retention standard of 85 percent using the existing regulatory methodology. NMFS determined the likelihood that additional vessels may be unable to meet the GRS, as calculated by NMFS, in coming years may unnecessarily increase compliance and enforcement costs, considering that the Council's objectives for retention appear to be met, as demonstrated in Table 2 of this preamble. In addition, NMFS explained that it now has actual enforcement experience indicating that the costs to NOAA of developing a GRS compliance case are high and will increase if the 85 percent GRS cannot be met by the fleet in 2012 and following years.

Emergency Action

After receiving NMFS' report and the public testimony described above, the Council recommended two GRS actions. First, the Council recommended that NMFS initiate an

emergency rule to suspend the application of the GRS. The Council voted 10 to 1 to request that NMFS promulgate an emergency rule to relieve the GRS requirement for the non-AFA trawl C/Ps. The statutory provisions for emergency rules are described in section 305(c)(1) of the MSA. On December 15, 2010, NMFS published an emergency rule exempting Amendment 80 vessels and cooperatives from GRS regulations, effective during 2010 and 2011 (75 FR 78172). The preamble to the emergency rule describes the Council's justification for emergency action, and it is not repeated here. An extension of this emergency action was published on June 2, 2011, and the action was effective until December 17, 2011 (76 FR 31881).

Second, the Council recommended the development of an analysis to review and recommend permanent changes to the GRS program. Given the concerns raised by NMFS and the public, the Council stated that the analysis should examine options that would revise the GRS or that would remove the specific regulatory requirements to meet a GRS, and allow the Amendment 80 sector to implement an internal retention monitoring program that ensures continued high groundfish retention. During the February 2011 Council meeting, NMFS, with its Office of Law Enforcement (OLE), reiterated the agency's concerns about the potential costs and complexity of enforcing the GRS across cooperatives. At final action, the Council unanimously recommended that NMFS implement a regulatory amendment to modify the GRS program such that it meets the management objectives for groundfish retention included in the BSAI FMP and that maintains incentives for groundfish retention through a new groundfish retention reporting requirement.

Rationale for Proposed Action

This action is intended to provide a long-term solution to the problems outlined by the Council in the problem statement. The Council determined that this action is necessary because

the circumstances that justified the increasing GRS have changed. The Council concluded that the regulatory constraint and associated GRS established for 2012, and each following fishing year, no longer achieve the goals that led to their establishment. This action is intended to mitigate higher than expected compliance costs of the GRS borne by the Amendment 80 sector. Furthermore, the Council determined that this action is needed to mitigate management and enforcement costs that were not foreseen when the regulation was promulgated.

The Council noted that the regulatory GRS of 85 percent may not be achievable by most vessels in the Amendment 80 sector in 2012 and each following year. The Council determined that the additional and potentially significant compliance costs associated with the 85 percent GRS are not warranted because the improvements in retention rates by the non-AFA trawl C/Ps through 2010 have met Council objectives. Furthermore, the Council concluded that the likelihood that additional vessels may be unable to meet the GRS, as calculated by NMFS, in coming years may unnecessarily increase compliance and enforcement costs, again noting that the Council's objectives for retention have been met.

Although this proposed rule would remove the GRS requirements from the regulations, Amendment 80 vessel owners have stated their intent to maintain groundfish retention rates that are consistent with Council intent, the BSAI FMP, and the MSA requirement that regulations be consistent with the 10 national standards for fishery conservation and management, including National Standard 9, which requires regulations to minimize bycatch to the extent practicable through cooperative civil contract agreements. The Council and NMFS determined that ongoing commitments of the Amendment 80 sector to maintain recent improvements in groundfish retention rates should enhance resource management and conservation.

Proposed Action

The proposed action would remove regulations implementing the GRS at §§ 679.7 and 679.27. To meet Council intent for this action, NMFS would revise the language at § 679.27(b)(4) to remove references to the GRS program and would remove § 679.27(j), which contains the bulk of the GRS program's regulations. This action is not intended to change the use caps, sideboard limits, recordkeeping, permitting, monitoring, or catch accounting requirements established for the Amendment 80 sector. This proposed action also would leave in place the regulations at § 679.27(b)(4) that require non-AFA trawl C/Ps to meet a 15 percent utilization standard for all retained groundfish species listed in Table 2a to part 679 that are used in the calculation for percent of retained groundfish.

Also, the proposed action would add regulations requiring each Amendment 80 cooperative to provide an annual report to NMFS on groundfish retention performance. NMFS would require Amendment 80 cooperatives to report groundfish performance as part of the Amendment 80 cooperative report established in regulations at § 679.5(s)(6). Under existing regulations at § 679.5(s)(6), each Amendment 80 cooperative issued a CQ permit must annually submit a report to the Regional Administrator detailing the use of the cooperative's CQ. In addition, this action would require Amendment 80 cooperatives to calculate and report their annual aggregate groundfish retention rate using the methodology currently established in regulation at § 679.27(j)(3). The Council recommended the regulatory methodology over the methodology used in the analysis for the GRS program because blend data are no longer available and because use of the regulatory methodology would provide the Council and the public with a consistent and comparable data set of groundfish retention rates since the implementation of the GRS program in 2008. This additional reporting requirement is intended to provide the Council, NMFS, and the public with information as to whether the groundfish

retention achievements of the GRS program are being maintained. As part of the annual reporting requirement proposed in this action, estimates of total catch for the non-AFA trawl C/Ps participating in Amendment 80 cooperatives would need to include all catch (as defined in § 600.10) that passes over the flow scale, including deliveries from other vessels, commonly referred to as “bags over the side.” NMFS would continue to oversee the submission of Amendment 80 cooperative reports and provide these reports to the Council.

Retaining Monitoring and Enforcement Provisions

To meet the Council’s intent that monitoring and enforcement regulations not change under this action, NMFS proposes to modify regulations at § 679.93(c)(1) to incorporate certain provisions in regulations that would otherwise be removed under this proposed action. OLE has expressed concerns that removing certain specific catch monitoring provisions could result in fishing behavior that was not intended by the Council when it took final action to remove the GRS. Currently, regulations implementing the GRS prohibit non-AFA trawl C/Ps from receiving deliveries of sorted catch. Amendment 80 vessels are authorized to receive deliveries of unsorted codends from vessels for processing. However, deliveries received from a catcher vessel’s refrigerated salt water tank are prohibited because such deliveries do not meet the definition of unsorted codend. “Unsorted Codend” is defined by regulations at § 679.2 as a codend of groundfish that is not brought on board a catcher vessel and that is delivered to a mothership, shoreside processor, or stationary floating processor without the potential for sorting. No other instance of catcher vessel harvest is considered an “unsorted codend.” All other catch that does not meet this definition is considered “presorted” whether or not sorting occurs.

Although the proposed rule would remove certain regulations at §§ 679.7(m)(3) and

679.27(j)(5)(iii) that require non-AFA trawl C/Ps to weigh all catch and prohibit any sorting of catch prior to weighing, this removal is necessary because these sections specifically reference the current GRS program that will be replaced by this action. However, the requirements put in place by these two provisions are essential to monitoring and enforcement. Sections 679.7(m)(3) and 679.27(j)(5)(iii) require weighing of catch and prohibit presorting, respectively. Removing these provisions would not be consistent with the Council's recommendation that this action not change existing monitoring and enforcement regulations. Therefore, this action would revise § 679.93(c)(1) to reincorporate these two requirements into the regulations, ensuring that the status quo monitoring and recording of catch by the Amendment 80 sector is retained and that pre-sorting will remain prohibited.

Recordkeeping and Reporting Requirements

The Council recommended that the Amendment 80 fleet be required to annually report groundfish retention using observer, scale, and product data that can be verified by NMFS. As noted earlier in this preamble, Amendment 80 cooperatives would be required to report annual groundfish retention rates to the Council as part of the extant Amendment 80 annual cooperative report, instead of requiring an additional report from these participants. The confidential catch and production data needed to calculate annual groundfish retention are generally available to both NMFS and the Amendment 80 entity responsible for meeting current observer and production reporting requirements established for the Amendment 80 fleet. The authorized representative of an Amendment 80 cooperative could request that NMFS verify these data (see ADDRESSES). These data could then be used by the Amendment 80 cooperative to calculate its annual groundfish retention rate. As recommended by the Council, this proposed rule would require each Amendment 80 cooperative to have a third party audit the cooperative's groundfish

retention calculations and include these findings as part of the Amendment 80 annual cooperative report. Any third party audit would require the Amendment 80 cooperative to coordinate with NMFS and the appropriate Amendment 80 entities for a release of confidential observer data and production data. NMFS notes that it is highly unlikely that the third party audit will differ from NMFS' or the cooperative's estimates of annual groundfish retention rates because the data used in the calculation originate from the same source.

The Council also recommended that it receive an annual report on groundfish retention performance by Amendment 80 vessels participating in the Amendment 80 limited access fishery. Rather than propose regulations that would require the owners of vessels participating in the Amendment 80 limited access fishery to report annual groundfish retention to the Council, NMFS determined that it would prepare information on groundfish retention performance for Amendment 80 vessels participating in the Amendment 80 limited access fishery. NMFS currently produces this data as part of its inseason management report to the Council, and would continue to report these retention rates to the Council during the October Council meeting. NMFS concluded that requiring individual vessels not participating in an Amendment 80 cooperative to participate in the new reporting requirement would be duplicative and could result in undue burden on these entities. Because NMFS will provide this information to the Council, no proposed regulation is needed to implement this aspect of the Council's recommendation.

Summary of Regulatory Changes

This action proposes the following changes to the existing regulatory text at 50 CFR part 679:

- Remove the definition of "Groundfish Retention Standard (GRS)" from § 679.2;
- Add requirements for cooperative reporting and third party audits to §

679.5(s)(6)(iii)(D) and (E);

- Remove the prohibitions specific to the GRS at § 679.7(m);
- Remove the requirement that Amendment 80 cooperatives meet a minimum GRS at § 679.7(o)(4)(iv);
- Revise improved retention and improved utilization regulations at § 679.27(b)(4);
- Remove regulations implementing the GRS at § 679.27(j); and
- Revise regulations at § 679.93(c)(1).

Classification

Pursuant to sections 304(b)(1)(A) and 305(d) of the MSA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). A copy of this analysis is available from NMFS (see ADDRESSES).

The IRFA for this proposed action describes the reasons why this action is being proposed; describes the objectives and legal basis for the proposed rule; describes and estimates the number of small entities to which the proposed rule would apply; describes any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; identifies any overlapping, duplicative, or conflicting Federal rules; and describes any significant alternatives to the proposed rule that accomplish the stated objectives of the MSA and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. A summary of that analysis follows.

Rationale, Objectives, and Legal Basis of the Proposed Rule

The preamble to this proposed rule describes the reasons why this action is being proposed, describes the objectives and legal basis for the proposed rule, and discusses both small and other regulated entities to adequately characterize the fishery participants. The MSA is the legal basis for the proposed rule. This proposed rule is needed to mitigate management and enforcement costs that were not foreseen when the regulation was promulgated. In addition, this action is needed to mitigate higher than expected compliance costs of the groundfish retention standard borne by the non-AFA trawl C/Ps. The objective for this proposal is to remove the groundfish retention standard for the Amendment 80 fleet and require the sector to report their groundfish retention performance to the Council annually. This objective is encompassed by authorities contained in the MSA. Under the MSA, the United States has exclusive management authority over all living marine resources found within the EEZ.

The management of marine fishery resources is vested in the Secretary of Commerce (Secretary), with advice from the Regional Fishery Management Councils. The groundfish fisheries in the EEZ off Alaska are managed under the Fishery Management Plan for Groundfish of the BSAI and the Fishery Management Plan for Groundfish of the Gulf of Alaska. Statutory authority for measures designed to reduce bycatch is specifically addressed in the MSA at section 301(a)(9). That section establishes National Standard 9 – Bycatch, which directs the Councils to minimize bycatch to the extent practicable or minimize mortality when bycatch cannot be avoided.

The groundfish fisheries of the BSAI and GOA are managed under the MSA. In the Alaska region, the Council is responsible for preparing management plans for marine fishery resources requiring conservation and management. NMFS, under the U.S. Department of

Commerce, is charged with carrying out the Federal mandates with regard to marine fish, once they are approved by the Secretary. NMFS' Alaska Regional Office and Alaska Fisheries Science Center review the management actions recommended by the Council.

Number of Small Entities to Which the Proposed Rule Would Apply

These impacts are analyzed in the RIR prepared for this action (see ADDRESSES). The entities directly regulated by this action are those catcher processors that are members of the Amendment 80 sector that target flatfish, Atka mackerel, Pacific cod, and Pacific ocean perch in the EEZ of the BSAI.

Earnings from all Alaska fisheries for 2009 were matched with the vessels that are members of the Amendment 80 sector and participated in the BSAI groundfish fisheries for that year. There are a total of 28 Amendment 80 qualified C/Ps in the sector. Based on the known affiliations and joint ownership of the Amendment 80 vessels, all vessels in the sector would be categorized as a large entity for the purpose of the RFA, because they all have annual revenues that exceed \$4 million. Due to their participation in a harvest cooperative or through known ownership of multiple vessels, co-ownerships and "shares" ownership arrangements among vessels, and other economic and operational affiliations, it is the aggregate annual gross receipts of all affiliated operations worldwide that are relevant under the Small Business Administration rules. Because of the lack of complete data on ownership and affiliation, it was determined that preparation of an IRFA, in lieu of 'certification' of this action under RFA, was appropriate, thereby allowing for public comment on this aspect of the RFA analysis.

Description of Significant Alternatives to the Proposed Action

An IRFA requires a description of any significant alternatives to the preferred alternative that would minimize any significant adverse economic impact of the proposed rule on small

entities. The suite of potential actions includes two alternatives.

The Council's preferred alternative, Alternative 2, has been selected as the action alternative. It would remove the GRS from the GRS program for the Amendment 80 sector. Revocation of the GRS will result in significant operational benefits and cost savings to all directly regulated entities. The Amendment 80 sector would be permitted to internally monitor the groundfish retention rates to meet Council retention goals described in the analysis prepared for Amendment 79 and the GRS program, but avoid mandatory compliance standards and their associated costs. The action would also include a requirement for the sector, as a whole, to report to the Council its annual groundfish retention performance. It would also further the program's original purpose of reducing bycatch, encouraging the use of all fish resources, and minimizing waste.

The Council also considered an alternative to revise the GRS to require groundfish retention at rates similar to the estimates presented in the analysis prepared for the GRS program. The Council determined that, while revising the GRS could reduce economic hardship imposed on the Amendment 80 sector by more closely correlating groundfish retention rates with historical retention rates, it would not address the monitoring, enforcement, and prosecution issues that arise from the requirements for annual determination of vessel compliance with the GRS program. Because this alternative would not resolve the problems for the program, the Council decided not to forward this alternative in the analysis for the proposed action.

Based upon the best available scientific data and information, and consideration of the objectives of this action, there are no alternatives to the proposed action that have the potential to accomplish the stated objectives of the MSA and any other applicable statutes and that have the potential to minimize any significant adverse economic impact of the proposed rule on directly

regulated small entities.

Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action is projected to have de minimis impact on the recordkeeping and reporting requirements of small entities participating in the BSAI groundfish fisheries. Some recordkeeping and reporting requirements may be needed by individual firms. Those firms that already record and report catch data will likely not be significantly impacted by this proposed action. It is not possible to determine which firms will be most impacted by the requirements, since the information each firm collects is based on what they need to operate their business and the current reporting requirements. The regulations proposed in this amendment are not expected to impact the recordkeeping and reporting requirements for any other entities in the fishery.

Under this action, NMFS would not require the individual owners and operators of non-AFA trawl C/P vessels participating in the limited access fishery to annually report groundfish retention performance. Instead, NMFS would prepare retention estimates for each vessel in the limited access fishery and present these data to the Council annually as part of the inseason management report.

Duplicate, Overlapping, or Conflicting Federal Rules

No Federal rules that might duplicate, overlap, or conflict with this proposed action have been identified.

Collection-of-Information Requirements

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval under OMB Control No. 0648-0565. Public reporting burden for

the Amendment 80 cooperative report is estimated to average 25 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS at the ADDRESSES above, and e-mail to OIRA_Submission@omb.eop.gov , or fax to [\(202\) 395-7285](tel:(202)395-7285).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: October 5, 2012.

Alan D. Risenhoover, Director, Office of Sustainable Fisheries,
performing the functions and duties of the Deputy Assistant Administrator for Regulatory
Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as
follows:

PART 679-- FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 et seq.; 1801 et seq.; 3631 et seq.; Pub. L. 108-447

§ 679.2 [Amended]

2. In § 679.2, remove the definition of “Groundfish Retention Standard (GRS).”

3. In § 679.5, add paragraph (s)(6)(iii)(D) and paragraph (s)(6)(iii)(E) to read as follows:

§ 679.5 Recordkeeping and reporting (R&R).

* * * * *

(s) * * *

(6) * * *

(iii) * * *

(D) For each Amendment 80 cooperative, the percent of groundfish retained by that
Amendment 80 cooperative of the aggregate groundfish retained by all Amendment 80 vessels
assigned to that Amendment 80 cooperative using the following equations:

$$GF_{roundweight} = \sum_{i=1}^n (PW_{species_n} / PRR_{species_n})$$

Substituting the value for GFroundweight into the following equation:

$$\text{GFR}\% = (\text{GFroundweight} / \text{TotalGF}) * 100$$

Where:

GFroundweight is the total annual round weight equivalent of all retained product weights retained by all Amendment 80 vessels assigned to that Amendment 80 cooperative for each IR/IU groundfish species.

PWspecies_n is the total annual product weight for each groundfish species listed in Table 2a to this part by product type as reported in the vessel's production report for all Amendment 80 vessels assigned to that Amendment 80 cooperative required at § 679.5(e).

PRRspecies_n is the standard product recovery rate for each groundfish species and product combination listed in Table 3 to this part.

GFR% is the groundfish retention percentage for an Amendment 80 cooperative calculated as GFroundweight divided by the total weight of groundfish catch.

TotalGF is the total groundfish round catch weight for all Amendment 80 vessels assigned to that Amendment 80 cooperative as measured by the flow scale measurement, less any non-groundfish, PSC species or groundfish species on prohibited species status under § 679.20.

(E) For each Amendment 80 cooperative, a third party must audit the Amendment 80 cooperative's annual groundfish retention calculations and the Amendment 80 cooperative must include the finding of the third party audit in its Amendment 80 annual cooperative report.

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§ 679.7 [Amended]

4. In § 679.7, remove and reserve paragraphs (m) and (o)(4)(iv).
5. In § 679.27,

a. Remove and reserve paragraph (j); and

b. Revise paragraph (b)(4) to read as follows:

§ 679.27 Improved Retention/Improved Utilization Program.

* * * * *

(b) * * *

(4) For catcher/processors not listed in § 679.4(l)(2)(i) using trawl gear in the BSAI, all species listed in Table 2a to this part, except for groundfish in prohibited species status.

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6. In § 679.93, revise paragraph (c)(1) to read as follows:

§ 679.93 Amendment 80 Program recordkeeping, permits, monitoring, and catch accounting.

* * * * *

(c) * * *

(1) Catch weighing. All catch are weighed on a NMFS-approved scale in compliance with the scale requirements at § 679.28(b). Each haul must be weighed separately, all catch must be made available for sampling by a NMFS-certified observer, and no sorting of catch may take place prior to weighing.

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